UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

United Aircraft Services, Inc.	)	
	)	
COMPLAINANT	)	
v.	)	
	)	
Hancock County Port and Harbor Commission and Hancock County Board of Supervisors	)	**Docket No. 16-00-04**
	)	
RESPONDENTS	)	

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a complaint filed in accordance with the Rules of Practice for Federally-Assisted Airport Proceedings, 14 C.F.R. Part 16 (Part 16).

United Aircraft Services, Inc. (UAS)/(Complainant) has filed a complaint against the Hancock County Port and Harbor Commission and the Hancock County Board of Supervisors of Bay St. Louis, Mississippi, (Respondents). UAS alleges that the Respondents, as co-sponsors of Stennis International Airport (Airport), have engaged in activity contrary to their Federal obligations, stating that the Respondents have "participated in unreasonable discrimination, unfair practices and/or deceptive practices in allowing Phillips Aviation to operate by a 'through the fence' agreement." [FAA Exhibit 1, Item 4, page 2]

Specifically, UAS cites sections of FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) that it alleges were violated by the Respondents: Order 5190.6A, Section 3-17; Order 5190.6A, Section 4-14; Order 5190.6A, Section 4-15; Order 5190.6A, Section 6-4; Order 5190.6A, Section 6-2; Order 5190.6A, Section 6-3; Order 5190.6A, Section 6-5; Order 5190.6A, Section 6-6; Order 5190.6A, Section 6-7. [FAA Exhibit 1, Item 1, page 4][1] In its

[1] The Order provides direction to FAA employees on FAA's policies regarding airport sponsors' compliance with Federal obligations; it does not create those obligations. The relevant Federal obligations and the basis for those obligations upon the Respondent are discussed in the Applicable Law and Policy section, below.

Reply, the Complaint cites statutory bases, including 49 U.S.C. § 40101(a)(4) and 49 U.S.C. § 46101(a)(1). [FAA Exhibit 1, Item 4, page 1][2]

In order to state a claim under Part 16, the Complainant must allege a violation of the laws cited in 14 CFR 16.1. Complainant has not cited any law listed in 14 CFR 16.1; however, the FAA construes the Complainant's citations to the Order to constitute allegations of violations of the laws associated with those sections of the Order. These laws include 49 U.S.C. § 47107(a)(1), (4), (5), (13) and 49 U.S.C. § 40103(e), which refer to standard Federal grant assurances #22 (unjust economic discrimination), #23 (exclusive right) and #24 (airport self-sustainability). Some of the sections of the Order cited, specifically Chapter 6, do not relate to any airport sponsor obligation under Section 16.1, and therefore, cannot be construed as fulfilling Section 16.23(b)(1).

The decision in this matter is based on applicable law and FAA policy regarding the Respondent's Federal obligations as imposed upon it by its grant assurances #22 and #23 (under 49 U.S.C. § 47107(a) and 49 U.S.C. § 40103(e)), review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding. An index of the administrative record is attached as FAA Exhibit 1.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds that the Respondents are not in violation of their Federal obligations.

II. THE AIRPORT

Stennis International Airport is a public-use airport located approximately 8 miles northwest of Bay St. Louis, Mississippi. The airport is owned and operated by the Hancock County Port and Harbor Commission, a co-sponsor for Federal airport grants with Hancock County. As of 1998, Stennis International Airport had approximately 71 based aircraft with 47,800 annual operations. [FAA Exhibit 2, attached]

The planning and development of Stennis International Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Plan (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, recodified at 49 U.S.C. § 47101 *et seq.* Specifically, since 1982, the County has entered into numerous AIP grant agreements with the FAA and has received a total of $6,027,801 through Fiscal Year 1999 in federal airport development assistance directly from the FAA. [FAA Exhibit 3, attached]

[2] The laws cited by the Complainant in its Reply do not create airport sponsor obligations. 49 U.S.C. §40101(a)(4) concerns policies that the Secretary should consider, and §46101 provides one basis for the filing of Part 16 complaints.

III. BACKGROUND

Prior to the Complainant's initiation of a relationship with the Respondents, another fixed-base operator[3] (FBO), Phillips Aviation, Inc. (Phillips) had been the sole FBO operating at the Airport (since 1988). It occupied a hangar with office space constructed in the 1970's. [FAA Exhibit 1, Item 3, exhibit 1, page 2]

On May 9, 1994, the Respondents provided a Warranty Deed to Project Hangars, Inc: "For and in consideration of the sum and amount of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), cash in hand." [FAA Exhibit 1, Item 4, exhibit C, page 1] This Warranty Deed conveyed a one-acre parcel (Project Hangar Parcel) that is currently occupied by Phillips in its off-airport FBO operation, in competition with UAS. The records submitted by the parties to this Complaint include documents relating FAA's review of this transaction. These documents show FAA agreements with the Respondents regarding the sale and use of the parcel [FAA Exhibit 1, Item 5, exhibit 3]; and the Respondents' inclusion of required restrictions in the Warranty Deed. [FAA Exhibit 1, Item 4, exhibit B] These documents demonstrate that the Respondents were released of their relevant Federal obligations, with appropriate deed restrictions, in regard to the Project Hangar Parcel, in a letter dated January 31, 1996. [FAA Exhibit 1, Item 5, exhibit 3] An October 1995 agreement between the FAA and the Respondents, regarding the Project Hangar Parcel, states:

> It is understood and agreed that execution of this agreement by the FAA is not approval for uncontrolled access to airport property from the subject property. A fee commensurate with that paid by other airport tenants and users will be imposed for access to airport property from this parcel. In addition the Owner further agrees that any Standards for Fixed Base Operators that are applicable to other Fixed Base Operators on the Airport are also applicable to any commercial aeronautical activities being conducted on the property herein described above. [FAA Exhibit 1, Item 5, exhibit 3, page 2]

As stated by the president of UAS, Alan Bishop (Bishop), "During the mid 1990s the airport parties[4] realized that the tremendous growth and expansion on the Gulf Coast had reached Stennis Airport. The new segment of users demanded a higher standard of physical facilities and service." [FAA Exhibit 1, Item 4, exhibit A, page 1] As stated by former Airport Director William Stovall (Stovall), in his affidavit:

> Phillip's FBO operation was primarily aimed at serving the general aviation aircraft and based aircraft owners who had historically made up the bulk of the users of the Airport.
>
> As time passed, efforts to further develop the Airport were successful to the point that it became evident that there was a need for a more aggressive approach to FBO services at the Airport. In addition, there were a number of buildings on the Airport that

[3] A fixed-base operator is a commercial entity, providing aeronautical services to the public.

[4] The term "airport parties" refers to the joint sponsors of the Airport, Hancock County Port and Harbor Commission and Hancock County Board of Supervisors, also referred to herein as the "Respondents."

had become somewhat rundown and that were in need of renovation.

In 1997, the Airport Parties were approached by United Air Service ("UAS") with an offer to renovate the Terminal Building and to put in a full-scale FBO operation based in the renovated Terminal and Hangar B. [FAA Exhibit 1, Item 3, exhibit 1, page 2][5]

On November 13, 1997, UAS entered into a fixed base operator's lease agreement with the Respondents (UAS Agreement). The UAS Agreement provided for a two-stage occupancy of facilities at the Airport. It provided for UAS taking occupancy of facilities described as Hangar B and the Terminal Building on December 1, 1997. It contained a rent schedule for use of Hangar B. It included a separate rent schedule for the use of the Terminal Building and included a two-year rent abatement in exchange for renovating the Terminal Building. It provided for UAS's occupancy of Hangar A, then occupied by Phillips, upon Phillips' termination of its lease or its expiration on March 1, 2000. The rent and any renovation of Hangar A to be made by UAS were to be negotiated sometime prior to November 30, 1999. The UAS Agreement also provided for a gross receipts payment and a fuel flowage fee. [FAA Exhibit 1, Item 1, exhibit A, pages 1-2] As stated by the Respondents, "After the end of the Terminal Building rate abatement period on December 1, 1999, both FBO's were making payments to the Airport according to the following schedule of charges: Rent, in an amount to cover both ground rent and building rent; Fuel Flowage Fee of 7 cents/gallon; Gross Receipts Fee of 7% of sales to commercial aviation; and Tie-down FEE of 75% of collections on tie-downs." [FAA Exhibit 1, Item 3, page 5]

On November 8, 1999, the Hancock County Port and Harbor Commission issued its *Minimum Standards for Commercial Aeronautical Activities*. (Minimum Standards) [FAA Exhibit 1, Item 3, exhibit 12] This document includes provisions for permitting commercial activities at the Airport, and minimum standards for FBO service providers, including minimum hangar and office space. Specifically, at section 5.1.3, the Minimum Standards state that FBOs shall:

> Lease from the Commission, or sublease from a tenant in good standing, sufficient land on which to locate intended fuel storage and dispensing equipment, buildings, aircraft parking area, tie-downs, auto parking, taxiways, apron and other facilities. [FAA Exhibit 1, Item 3, exhibit 12, page 6]

At section 5.1.4, the Minimum Standards provide that FBOs shall:

> Construct and/or lease adequate building area, incorporating properly lighted and heated floor space for office, public and customer uses, including but not limited to, pilot waiting and resting areas, conference/meeting room(s), computerized weather reporting equipment, public waiting area(s), rest rooms, and telephone. Minimum hangar deck shall be 10,000 square feet and minimum public area shall equal 2,000 square feet. [FAA Exhibit 1, Item 3, exhibit 12, pages 6-7]

[5] In his affidavit, the president of UAS, Alan Bishop (Bishop) claims that the Sponsor approached UAS, stating "In early 1997, the airport manager, Mr. Stovall, approached Alan Bishop.... United submitted a detailed FBO proposal after several meetings with airport officials." [FAA Exhibit 1, Item 4, exhibit A, page 2]

At section 5.1.6, the Minimum Standards provide that FBOs shall:

> ii. Fueling Systems: Maintain separate fueling systems for grade of fuel provided including separate tanks, filters, pumps and hoses... vi. Standards of Fuel: Provide at least two types of aviation fuel; Jet fuel, and 80 or, 100LL or, 100-130 octane aviation gasoline... x. Tank Capacity: Provide at least 10,000 gallons of fixed (permanent) tank capacity for each type of fuel provided. [FAA Exhibit 1, Item 3, exhibit 12, pages 7-8]

In anticipation of the expiration of Phillips' lease of Hangar A, the Respondents began negotiating with UAS for its eventual occupancy of Hangar A. On January 10, 2000, the Respondents passed a resolution at the Hancock County Port and Harbor Commission Meeting agreeing to terms with UAS, by which UAS would make repairs to Hangar A (then occupied by Phillips' until the expiration of its lease in March 2000) and pay rent according to an agreed upon schedule and take occupancy. [FAA Exhibit 1, Item 1, exhibits H and I]

The Respondents also engaged Phillips in negotiations, anticipating the expiration of Phillips' lease. As stated in the first affidavit of William Cotter, current Airport Director (Cotter):

> ...the Airport Parties explored with Phillips various options for maintaining its FBO business on the Airport. For example, the Airport Parties offered Phillips the option of having the County build it a replacement facility, which Phillips would occupy under a 10-year lease. Given the totality of the circumstances, possibly including the age of its principal owner... Phillips did not feel comfortable taking on the long-term lease obligation to the County, which was in its turn unwilling to finance construction of a facility for Phillips without a long-term lease...
>
> ...the Airport was concerned that UAS would respond to Phillips' withdrawal from the fuel market by increasing fuel prices to airport users.
>
> The Airport Parties' relationship with Phillips, its principal owner Gene Phillips, and at least some of its users was not untroubled, especially during this transition period. FAA received two Part 16 complaints, both of which were dismissed without investigation, from Phillips and its users relating to the reconfiguration of FBO facilities at the Airport and the need for Phillips to move from Hangar A.[6] Many general aviation pilots using the Airport felt very strongly that Phillips should be kept on the Airport as a competitor to UAS. [FAA Exhibit 1, Item 3, exhibit 2, paras 5-7]

In a letter to the Respondents, dated November 29, 1999, Phillips stated:

> In the event that there is no way that you can extend the Phillips Aviation, Inc.'s (PAI) lease on Hangar "A", please consider accepting PAI's proposal to use 10,000 square feet

[6] The FAA dismissed two Part 16 complaints without prejudice on procedural grounds against the Hancock County Port and Harbor Commission. These were entitled Phillips Aviation, Inc v Hancock County Port and Harbor Commission, FAA Docket No. 16-99-13 (1999); Dr. Hewitte A. Thian and Hancock County Airport Users and Safety Association v Hancock County Port and Harbor Commission, FAA Docket No. 16-98-11 (1998). Neither was refiled.

> of hangar and 2,000 square feet of office space leased from the Project Hangar, Inc.... The aforementioned arrangement which is far from ideal will allow PAI to continue to do business including dispensing fuel on Stennis International Airport (HSA). PAI wishes to be on the top of the list to lease or re-lease Hangar "A" if it becomes available in the future. Please seriously consider this a "last ditch" effort to allow PAI a place to operate and compete on HSA until the [Respondents] can offer PAI suitable space to meet the minimum requirements on HSA.[7] [FAA Exhibit 1, Item 1, exhibit D]

These FBO facilities described here, were eventually leased to Phillips on December 27, 1999 (for occupancy on March 1, 2000) and are currently used to support its FBO activities. [FAA Exhibit 1, Item 5, exhibit 1]

The Respondents wrote the FAA's Jackson Airports District Office (ADO) on January 6, 2000 for advice regarding Phillips' proposal for a "Through-the-Fence Operation." The letter stated:

> Land is available on the Airport to construct hangars and has been offered to Phillips Aviation Inc. We propose $.0.25 per square for a land lease. A $0.375 ($0.25 x 1.5) per square foot rate is proposed for this Through the Fence Operation. The FBO on the field as well as the Through the Fence Operator will pay the same fuel flowage fee. [FAA Exhibit 1, Item 1, exhibit F]

The ADO responded on January 12, 2000, stating, "FAA policy is to discourage through the fence operations but we do not prohibit them." [FAA Exhibit 1, Item 1, exhibit G]

At the same Commission meeting (January 10, 2000), at which the Respondents resolved to accept terms for UAS's occupancy of Hangar "A," the Respondents also resolved to come to agreement with Phillips regarding a FBO agreement and a "Through the Fence User Agreement." The resolution also stated that the Airport Director "is hereby authorized to execute said documents [agreement] on behalf of [the Respondents] and that said documents be forwarded to FAA for their review."[8] [FAA Exhibit 1, Item 1, exhibit K]

On February 22, 2000, the Respondents entered into two agreements with Phillips that allowed Phillips to access the airport to offer FBO services for a term of two years, beginning on March 1, 2000 (the date of the expiration of Phillips' Hangar "A" lease). [FAA Exhibit 1, Item 3, exhibits 5 & 6] One of these documents, *Airport Access and Use Agreement* (Phillips Access Agreement), provided for rights to access to the Airport by Phillips and required a payment of $4,500 per year in monthly installments. The Phillips Access Agreement also provided for an escalation in this payment for the second year. [FAA Exhibit 1, Item 3, exhibit 6]

The other document was a *Fixed Base Operator's Agreement* (Phillips FBO Agreement) similar in form and content to the UAS Agreement, described above. The Phillips FBO Agreement provided for a two-year term for occupancy of facilities at the Airport on the North Ramp, away

[7] The letter also requested a lease of a fuel farm and ramp space, both on Airport property.

[8] FAA approval of lease and use agreements is not required, nor given.

from the centrally located UAS facilities (See FAA Exhibit 1, Item 3, exhibit 4). The Phillips FBO Agreement contained a rent schedule for use of the North Ramp. The Phillips FBO Agreement also provided for a gross receipts payment and a fuel flowage fee, equivalent to that which was included in the UAS Agreement. Regarding fueling facilities and flowage fees, the Phillips FBO Agreement states at paragraph 6, "In the event that Lessee shall be assigned the use and control of designated fuel tanks, Lessee shall pay to Lessor for the right to sell fuel and for the use of fuel tanks owned by Lessor, a fuel flowage fee for each gallon of fuel sold or contract fuel pumped by Lessee." [FAA Exhibit 1, Item 3, exhibit 5]

Considering the requirements of both Phillips agreements, as stated by the Respondents, and confirmed by FAA review of the documents, "... on December 1, 1999, both FBO's were making payments to the Airport according to the following schedule of charges: Rent, in an amount to cover both ground rent and building rent; Fuel Flowage Fee of 7 cents/gallon; Gross Receipts Fee of 7% of sales to commercial aviation; and Tie-down FEE of 75% of collections on tie-downs." [FAA Exhibit 1, Item 3, page 5] However, once Phillips gave up its leasehold in March 2000, it did not have exclusive use of any buildings on the Airport, having arranged to meet its hangar and office requirements by lease of such facilities from Project Hangar. [FAA Exhibit 1, Item 5, exhibit 1]

IV. ISSUES

The principal matter to be determined by the FAA is whether or not the airport sponsor is in compliance with its Federal obligations as embodied in its Federal grant agreements and conveyances of Federal land, listed in 14 CFR 16.1. Upon review of the Complainant's allegations and the record summarized above in the Background Section, the FAA has determined that the following issues require consideration and analysis in order to provide a complete review of this sponsor's compliance with applicable Federal law and FAA policy, discussed below:

1. Whether the Respondents' having permitted Phillips' through-the-fence operation, having allegedly failed to charge comparable rates and rents to its FBOs and/or having allegedly failed to require Phillips to adhere to the airport minimum standards constitute unjust economic discrimination by the Respondents in violation of Federal grant assurance #22.

2. Whether the Respondents' alleged application of its airport minimum standards in an unjustly discriminatory manner constitutes the constructive grant of an exclusive right in violation of Federal grant assurance #23.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101 *et seq.*, assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in encouraging and

developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq*. This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, *i.e.*, a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements, binding the sponsor upon acceptance of the Federal assistance.

The Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation must receive certain assurances from the airport sponsor.

The AAIA sets forth requirements to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included as assurances in every airport improvement grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

This Complaint concerns the Respondents' allowance of a FBO operating on non-Airport property and gaining access to the airfield by means of an operating agreement with the Respondents that allows this "through-the-fence" operation. There is no one airport assurance that prohibits such an arrangement. Rather these arrangements are subject to review by the FAA to ensure that they are consistent with the airport assurances discussed below. As stated in the Order:

> There are times when the owner of an airport will enter into an agreement which permits access to the public landing area by aircraft based on land adjacent to, but not a part of, the airport property..... The obligation to make an airport available for the use and

benefit of the public does not impose any requirement to permit access by aircraft from adjacent property.... The owner of an airport is entitled to seek recovery of initial and continuing costs of providing a public use landing area. The development of aeronautical enterprise on land uncontrolled by the owner of the public airport can result in a competitive advantage for the "through the fence" operator to the detriment of on airport operators. To equalize this imbalance the airport owner should obtain from any off-base enterprise a fair return for its use of the landing area.... As a general principle, FAA will recommend that airport owners refrain from entering into any agreement, which grants access to the public landing area by aircraft normally stored and serviced on adjacent property. See Order, § 6-6.

The FAA notes that it may not oppose a "through-the-fence" agreement, "where operating restrictions ensure safety and equitable compensation for use of the airport." See Order, § 6-6(d).

Assurance #22: Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. §§ 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

"...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." Assurance 22(a).

"...will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair, and fueling) that it may choose to perform." Assurance 22(f).

"...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h).

"...may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i).

Subsection (h) qualifies sub-sections (a) and (f), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

The grant assurance specifically addresses the issue of the treatment of fixed-based operators (FBOs), stating that "Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities." Assurance 22(c). Subsection (c) specifies the application of subsection (a) to the treatment of

FBOs, providing additional specific guidance as to the sponsor obligations.

The Order describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Secs. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a).

Assurance #23: The Prohibition Against the Granting of an Exclusive Right

Section 308(a) of the FAA Act, 49 U.S.C. § 40103(e), provides, in relevant part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." 49 U.S.C. § 40103(e). An "air navigation facility" includes an "airport." See 49 U.S.C. §§ 40102(a)(4), (9), (28).

Section 511(a)(2) of the AAIA, 49 U.S.C. § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Assurance 23, "Exclusive Rights," of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a Federally obligated airport:

> "... will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."

In the Order, the FAA discusses its exclusive rights policy and broadly identified aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. See Order, Sec.3-9(e).

Assurance #24: Airport Fee and Rental Structure

Section 47107 (a)(13) of 49 U.S.C. requires, in pertinent part, that the sponsor of a Federally obligated airport "will maintain a fee and rental structure for the facilities and services being

provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport." In addition, under § 47107(a), fees must be reasonable and not unjustly discriminatory.

Assurance 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the sponsor of a Federally obligated airport "agrees that it will maintain a fee and rental structure consistent with Federal grant assurances #22 and #23, discussed below, for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection."

The Order states that the sponsor's obligation to make an airport available for public use does not preclude the owner from recovering the cost of providing the facility through fair and reasonable fees, rentals or other user charges which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. See Order, § 4-14(a).

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on consensual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition to the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

VI. ANALYSIS

A sponsor's Federal obligations do not relieve aeronautical businesses on the sponsor's airport from their assumption of standard business risk. This risk includes the risk of competition, present and future, anticipated and unanticipated. Economic advantage being held by one competitor, alone, is not sufficient evidence of a sponsor's violation of its Federal commitments. Airport businesses frequently pursue business strategies designed to disadvantage their competition. The alleged advantage held by Phillips is relevant to the Complainant's need to demonstrate that it has been directly and substantially affected by any alleged noncompliance by the sponsor. See Part 16 §16.23(a). The existence of a competitive advantage can be considered supporting evidence to other evidence regarding the sponsor's actions; however, the FAA's requirement in analyzing the allegation of noncompliance is to review the sponsor's actions and omissions to determine if they have violated their Federal obligations.

Before addressing the specific allegations below, the FAA notes that the Respondents have been duly released of all Federal obligations of the Project Hangar Parcel. [FAA Exhibit 1, Item 5, exhibit 3] The Project Hangar Parcel appears to have been disposed of, and is no longer Airport property. [FAA Exhibit 1, Item 1, exhibit C, page 1] The record demonstrates that the Respondents have included appropriate deed restrictions. [FAA Exhibit 1, Item 1, exhibit B] Beyond these facts, the history of the release process is not relevant to the allegations in this Complaint.

Accordingly, the FAA examines the two issues identified above.

ISSUE ONE

> Whether the Respondents' having permitted Phillips' through-the-fence operation, having allegedly failed to charge comparable rates and rents to its FBOs and/or having allegedly failed to require Phillips to adhere to the airport minimum standards constitute unjust economic discrimination by the Respondents in violation of Federal grant assurance #22

Allowance of through-the-fence operations

An airport sponsor's allowance of a through-the-fence operation alone is not sufficient evidence of unjust economic discrimination. As stated by the FAA in its letter to Cotter, dated January 12, 2000, "FAA policy is to discourage through the fence operations but we do not prohibit them." [FAA Exhibit 1, Item 1, exhibit G] See Also Order Section 6-6.

In order to find a violation of an airport sponsor's Federal obligations, the FAA would have to determine that the specific arrangements, under the control of the sponsor and among similarly situated aeronautical service providers, were unjustly discriminatory. A sponsor can refuse to allow through-the-fence operations, without violating the grant assurance requiring access, but allowing such operations is not prohibited under Federal assurances. In this case, the question of competition of aeronautical service providers on the Airport is relevant to the actions of the

sponsor. The Respondents have demonstrated their interest in providing appropriate and desired services to the aeronautical users of the airport by their willingness to accommodate competition at the Airport. This market was demonstrated to Airport management by a petition of airport users in support of Phillip's continued operation at the Airport. [See FAA Exhibit 1, Item 3, exhibit 8]

The FAA finds that the allowance of a through-the-fence operation, in this case, does not, alone, constitute a violation of the Respondents' Federal obligations.

Alleged disparate rates, rents and fees

More specifically, the Complainant alleges that the Respondents have failed to charge comparable rates to Phillips, stating,

> ... the monthly rental/access fee paid by the parties is clearly disproportionate. United pays $3000.00 per month, Phillips $150.00 per month. [FAA Exhibit 1, Item 4, page 3]

However, in its Reply, the Complainant admits that "the fuel flowage fees, gross receipts fees and tie down fees are similar," focusing its allegations on the "rental/access fees." [FAA Exhibit 1, Item 4, page 4]

In response, the Respondents state, "Phillips is paying charges greater than or equivalent to those it would be paying with an equivalent on-airport facility, and greater than or equivalent to those paid by UAS." [FAA Exhibit 1, Item 3, page 13]

Although the Complainant and Respondents do not use the exact same figures, they appear to refer to UAS's rent of two facilities originally occupied by UAS, the terminal and Hangar "B."[9] It would appear from its lease, that UAS is paying $1,200 per month for its occupancy of Hangar "A" and $1,900 per month for its occupancy of the terminal building. These payments total $37,100 per year for its leasehold. [FAA Exhibit 1, Item 1, exhibit A, pages 2-3]

By the terms of the Phillips FBO Agreement, Phillips pays an $1800 annual rent for its use of the North Ramp. [FAA Exhibit 1, Item 3, exhibit 5] As reflected in the Phillips Access Agreement, Phillips is paying an Airport User Fee in the amount of $4,500 per year:

> based on an annual rate of thirty seven and on half cents ($0.375) per square foot per year for the first year for each square foot of commercial area of twelve thousand square feet (12,000) used in the fixed based operation, with an increase of $00.5 per square foot per year during the second year... [FAA Exhibit 1, Item 3, exhibit 6, pages 1 & 2]

[9] Upon review of the record, the FAA cannot conclude that UAS has finalized an agreement to occupy Hangar "A" as previously agreed to by the parties. [FAA Exhibit 1, Item 1, exhibits H, I & J]. It does not appear that the parties to the Complaint are including the rent for that facility in their respective comparisons. UAS's business decision to expand its leasehold beyond that which is required of the minimum standards is not relevant to a determination that rental rate schedule is not unjustly discriminatory.

Regarding this access fee, the Respondents state that they charged Phillips "an airport access/airport use fee equal to 150% of the amount it would have paid for land rent had it located its replacement facility on airport property (thus providing for support of the public landing area and eliminating any financial incentive for FBOs to move off-airport). [FAA Exhibit 1, Item 3, page 8]

The Respondents further argue that Phillips pays the non-sponsor party, Project Hangar, Inc., a rent for the use of the off-airport hangar used in its operations. This rent is shown to be $2,400 per month.[10] [FAA Exhibit 1, Item 5, exhibit 1]

Therefore, the record reflects that Phillips pays the Respondents $6,300 per year for access and use of Airport facilities that do not contain buildings and improvements equivalent to that occupied and used by UAS. Furthermore, the Respondents have provided evidence that Phillips pays an additional $28,800 to Project Hangar, Inc. From review of these primary documents, the FAA observes that Phillips pays a total of $35,100 per year in payments to the Respondents and Project Hangars. UAS pays $37,100 to the Respondents for more extensive facilities. This comparison does not take into account payment schedules not in dispute including fuel flowage fees, tie-down fees and gross receipts fees, discussed above.

The FAA notes that a sponsor is not required to charge the same amount for FBO competitors using facilities differing in quantity or quality. The Order states:

> If one operator rents office and/or hangar space and another builds its own facilities, this would provide justification for different rental and fee structures. These two operators would not be considered essentially similar as to rates and charges even though they offer the same services to the public. See Order, Sec.4-14d (2)(a).

Clearly, Phillips is occupying far less space on the airport and using fewer Airport financed and owned facilities. If Phillips had leased land for the construction of hangar and office space, then it would be paying less per square foot than the Respondents are currently charging Phillips in access fees. A sponsor is not required to ensure that a tenant uses its own money to construct the facilities required to meet the minimum standards of the sponsor. A tenant's means of financing the improvements to its leasehold cannot be the basis for a finding that the sponsor has unjustly discriminated. Rather, the tenant is free to pursue the most financially advantageous means of meeting the minimum standards.

The evidence provided by the Complainant fails to establish that the Respondents have applied discriminatory rental rates, access fees or use fees.[11] Once again, as stated above, the

---

[10] The amount of this payment is not directly relevant to the allegation of discrimination by the Sponsor, since the property used and occupied is not owned by the Sponsor.

[11] UAS's citing of the different fuel prices offered by it and Phillips is wholly irrelevant to the establishment of the Respondents' noncompliance with its Federal obligations, because it does not shed light on Respondents' actions or inactions. [FAA Exhibit 1, Item 4, exhibit D]

Respondents' Federal obligations do not protect airport tenants from competitive enterprises with lower operational costs.[12]

Disparate application of the Airport's minimum standards

Finally, the Complainant specifically alleges that the Respondents have failed to equitably enforce and apply its minimum standards upon Phillips, stating, "UAS is required to comply with the airport's minimum standards. PA is not required to conform." [FAA Exhibit 1, Item 1, page 4-5] Complainant states in its Reply:

> Phillips has not met minimum standards. In order to meet the minimum standards, Phillips would be required to expend a large amount of capital to construct an adequate building, provide a minimal hangar, maintain a proper fueling system, and provide 10,000 gallons of fixed (permanent) tank capacity for each type of fuel. Instead, Phillips chooses not to expend the capital necessary to meet the minimum standards. [FAA Exhibit 1, Item 4, page 3]

Regarding the Minimum Standards, the Respondents state:

> ...nowhere in the Minimum Standards is the requirement that FBOs must "expend a large amount of capital" to be allowed to operate at the airport...
>
> Nor do the Minimum Standards require that an FBO construct (or renovate) facilities as a condition of operation....
>
> ...the Minimum Standards require that FBOs offer at least two types of fuel (jet fuel and "avgas"), with "at least 10,000 gallons of fixed (permanent) tank capacity for each type of fuel provided." [FAA Exhibit 1, Item 5, page 2] See Background Section.

Section 5.1.4 of the Minimum Standards state that FBOs shall construct or lease buildings sufficient to provide a minimum hangar deck of 10,000 sq. ft. and minimum public area of 2,000 sq. ft. [FAA Exhibit 1, Item 3, exhibit 12, pages 6-7] At section 5.1.3, the Minimum Standards also state that FBOs shall "Lease from the Commission, or sublease from a tenant in good standing, sufficient land on which to locate intended... facilities." [FAA Exhibit 1, Item 3, exhibit 12, pages 6-7] See Background Section, above.

According to the record documents, Phillips appears to meet the Minimum Standards. The Respondents summarize the Phillips fueling facility, described in the second Cotter affidavit:

> There are currently two fuel farms at the Airport. Both were constructed and are owned by the Airport Parties.... The newer one.... is operated by UAS.... An older underground fuel farm is operated by Phillips for its business... Both systems are

[12] Although the Complainant cites sections 6-2b and 6-4 of the Order that deal with a sponsor's obligation to maintain a rate structure to make the airport as self-sustaining as possible, it fails to argue how the sponsor has violated grant assurance #24. Furthermore, the FAA has not found independent evidence of such a violation. Therefore, this allegation will not be furthered addressed.

> properly licensed. Both systems meet or exceed the Minimum Standards for commercial fueling.... Both systems have at least two 10,000-gallon fuel tanks.... Thus, Phillips meets the Minimum Standards for commercial fueling...[FAA Exhibit 1, Item 5, pages 3-4. See Also FAA Exhibit 1, Item 5, exhibit 2]

As described in the background section above, Phillips' agreement with Project Hangar, Inc. appears to provide the required hangar space (10,000 sq. ft.) and office space (2,000 sq. ft.). [FAA Exhibit 1, Item 5, exhibit 1] The Minimum Standards do not prohibit the leasing or subleasing of hangar space by FBOs. Also, Phillips has obtained, by the Phillips FBO Agreement, use of ramp space (North Ramp). It has also made a payment to the Respondents, pursuant to the Phillips Access Agreement, equivalent to 150% of the cost of leasing 12,000 sq. ft. of land on the Airport. [FAA Exhibit 1, Item 3, exhibit 6]

The Respondents anticipate an argument that the Complainant does not make regarding Section 5.1.3 of the Minimum Standards, which states that FBOs shall "Lease from the Commission, or sublease from a tenant in good standing, sufficient land on which to locate [its facilities]. [FAA Exhibit 1, Item 3, exhibit 12, pages 6-7] The Respondents state:

> While UAS may claim that Phillips is not meeting its interpretation of the Minimum Standards (in that Phillips' facilities are not located on land leased or subleased from the [Respondents]), the Airport Parties disagree with that interpretation and, as the public bodies that promulgated the standards, are primarily charged with interpreting them. The minimum standards also state clearly, at §3, that the [Respondents] shall not make an illegal grant of any exclusive right to provide an aeronautical service. [FAA Exhibit 1, Item 3, pages 9-10]

The Respondents' interpretation that Phillips meets the minimum standards by reason of the Phillips Access Agreement and the Phillips FBO Agreement, along with Phillips having provided adequate hangar space, office space, ramp space and fueling capacity is reasonable. The Phillips Access Agreement is literally based on the presumption of Phillips paying the Respondents 150% of the cost of leasing 12,000 sq. ft. of Airport land. UAS does not state that it had any interest in a through-the-fence operation, nor has it presented any information relating to the Respondents inconsistently interpreting this provision. Therefore, the Respondents appear to have been consistent in their interpretation of its own Minimum Standards. Finally, the Respondents' statement that they accepted the through-the-fence operation to avoid creating an exclusive right is reasonable.

Accordingly, the FAA cannot find that the Respondents have unjustly discriminated between the FBOs operating at the Airport by allowing a through-the-fence operation, and/or by failing to set equitable rates and rents, and/or by failing to apply the Minimum Standards reasonably and consistently.

ISSUE TWO

> Whether the Respondents' alleged application of its airport minimum standards in an unjustly discriminatory manner constitutes the constructive grant of an exclusive right in violation of Federal grant assurance #23.

The Complainant alleges a violation of Order 5190.6A, Section 3-17 [FAA Exhibit 1, Item 1, page 4]. The Order states:

> Where minimum standards are proposed, the FAA representative may comment on the relevance and/or reasonableness of the standards. ... The FAA should make an official determination only when the effect of a standard denies access to a public-use airport, and the determination should be limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or the standard results in an attempt to create an exclusive right. See Order, Sec.3-17(b).[13]

The FAA has construed Complainant's citation to the Order to constitute the allegation and issue stated above. However, the FAA could not determine, from the evidence in the record, that the Sponsor's implementation of its Minimum Standards has had the effect of unjustly discriminating. Therefore the FAA cannot find that the Sponsor has constructively granted an exclusive right. Furthermore, the Complainant fails to argue this point, beyond the citation of the section in the Order. Finally, Phillips and UAS are currently providing competitive FBO services, fatally undermining the claim that an exclusive right exists.

FINDINGS AND CONCLUSIONS

Upon consideration of the submissions by the parties, relying on the record herein and the applicable law, and for the reasons stated above, the FAA Office of Airport Safety and Standards finds and concludes as follows:

1. The actions of the Sponsor regarding its treatment of UAS and Phillips Aviation, Inc., as described above, do not constitute unjust economic discrimination in violation of Federal grant assurance #22.

2. The Sponsor's application of its minimum standards to its FBOs has not constructively granted an exclusive right to Phillips in violation Federal grant assurance #23.

[13] In this case, the section clearly represents instructions to FAA employees regarding the procedures for reviewing airport minimum standards for possible discriminatory features or the potential for the granting of an exclusive right. However, the FAA construes the Complainant's reference to constitute an allegation of the constructive granting of an exclusive right by means of discriminatory application of minimum standards.

ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed.

2. All Motions not expressly granted in this Determination are denied.

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and Sections 511(a), 511(b), and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. §§47105(b), 47107(a)(1)(2)(3)(5)(6)(7)(8)(17), 47107(g)(1), 47110, 47111(d), 47122, respectively.

RIGHT OF APPEAL

This Director's determination is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. 14 CFR 16.247(b)(2). A party adversely affected by the Director's determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR 16.33(b) within thirty (30) days after service of the Director's determination.

Signed,

David L. Bennett
Director, Office of Airport
Safety and Standards

10/12/2000
Date